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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re J.W., a Person Coming Under the
Juvenile Court Law.

B174731
(Los Angeles County
Super. Ct. No. CK35404)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

S.W.,

Defendant and Respondent;

J.W.,

Appellant.

Appeal from an order of the Superior Court of Los Angeles County. Emily A. Stevens, Judge. Affirmed.

Sharon S. Rollo, under appointment by the Court of Appeal, for Appellant.

No appearance for Plaintiff and Respondent.

Kate M. Chandler, under appointment by the Court of Appeal, for Defendant and Respondent.

By her attorney, J.W. (born in Feb. 2004) appeals from an April 15, 2004 order granting her mother, S.W. (Mother), reunification services.¹ We affirm the order because substantial evidence supports the juvenile court's finding under Welfare and Institutions Code section 361.5, subdivision (c) that reunification services were in J.W.'s best interest notwithstanding a sustained petition based on the finding that Mother had sexually abused a sibling, and notwithstanding the termination of Mother's reunification services and parental rights with respect to three of J.W.'s siblings.²

¹ Mother asserted that J.W.'s father was R.S., who was incarcerated during the proceedings involving J.W. The court ordered DNA testing to determine J.W.'s paternity, but test results were not available at the time of the April 15, 2004 order.

Although Mother asserted at J.W.'s detention hearing that her birth certificate listed R.S. as J.W.'s father and listed the child's name as J.S., no birth certificate is contained in the record. The record and appellate briefs refer to the child as J.W., and for the sake of consistency, we also refer to the child as J.W.

² Unless otherwise specified, statutory references are to the Welfare and Institutions Code.

We use the term "sibling" to include half sibling. (See § 361.5, subd. (a)(3) ["For purposes of this section, 'sibling' means a person related to the child by blood, adoption, or affinity through a common legal or biological parent"].) R.S. was not the alleged father of any of J.W.'s siblings.

Section 361.5, subdivision (c) provides in pertinent part: "The court may not order reunification for a parent or guardian described in paragraph . . . (6), . . . (10), (11) . . . of subdivision (b) unless the court finds, by clear and convincing evidence, that reunification is in the best interest of the child."

Section 361.5, subdivision (b) provides in pertinent part: "Reunification services need not be provided to a parent or guardian described in this subdivision when the court finds, by clear and convincing evidence, any of the following: [¶] . . . [¶] (6) That the child has been adjudicated a dependent pursuant to any subdivision of Section 300 as a result of severe sexual abuse or the infliction of severe physical harm to the child or a sibling . . . by a parent or guardian and the court makes a factual finding that it would not benefit the child to pursue reunification services with the offending parent or guardian. [¶] . . . (10) That the court ordered termination of reunification services for any siblings of the child because the parent or guardian failed to reunify with the sibling after the

(footnote continued on next page)

FACTUAL AND PROCEDURAL BACKGROUND

In February 2004, Mother's parental rights were terminated as to J.W.'s brother, D.P., born in January 1998. In April 2004, Mother's parental rights were terminated as to two other brothers, N.J., born in September 2001, and J.J., born in July 2002. We affirmed the orders terminating the parental rights to J.W.'s three siblings in an unpublished opinion filed in October 2004 and modified in November 2004. (*In re D.P.* (B174163) filed Oct. 21, 2004, as modified by order of Nov. 16, 2004.) Upon her birth in February 2004, J.W. was detained at the hospital. Her siblings' foster mother, who is also their prospective adoptive parent, also became the foster parent for J.W. in April 2004. All four children remain placed together with the foster parent, who has expressed a willingness to adopt J.W. along with her three siblings.

In August 1998, the Department of Children and Family Services (DCFS) detained 16-year-old Mother and D.P. after the maternal grandmother was arrested and both Mother and D.P. were left without a caretaker. D.P. was placed with the maternal great aunt, where he remained until September 2002. In October 1998, D.P. was declared a dependent child pursuant to section 300, subdivisions (b) (Mother's failure to protect because of her lack of resources and lack of emotional maturity) and (g) (D.P.'s father failed to provide for child's support). By April 1999, Mother had completed parenting classes and was permitted overnight and weekend visits with D.P. But in 2000 and 2001 Mother did not have a stable residence, was not employed, had not begun individual

(footnote continued from previous page)

sibling had been removed from that parent or guardian pursuant to Section 361 . . . and that, according to the findings of the court, this parent or guardian has not subsequently made a reasonable effort to treat the problems that led to removal of the sibling [¶] (11) That the parental rights of a parent over any sibling of the child had been permanently severed, and this parent is the same parent described in subdivision (a), and that, according to the findings of the court, this parent has not subsequently made a reasonable effort to treat the problems that led to the removal of the sibling of that child from the parent."

counseling ordered by the case plan, and her visits with D.P. were sporadic. In March 2002, the juvenile court found that Mother was not in compliance with the case plan and terminated reunification services with D.P.

Upon their births, N.J. and J.J. remained in Mother's custody under a voluntary family maintenance contract. In September 2002, during an extended visit with Mother, all three boys were detained and placed together in foster care after Mother had left them under the supervision of the maternal grandmother, whom DCFS considered not to be an able or appropriate caretaker. The children were unwashed and neglected, and Mother admitted that the father of J.J. had engaged in domestic violence against her in the presence of the children.

In October 2002, the juvenile court sustained a section 387 supplemental petition, removing D.P. from his placement with the great aunt due to her deteriorating health and medical problems and ordering that D.P. remain in long-term foster care. The juvenile court also sustained a subsequent petition with respect to D.P., based on findings under section 300, subdivision (b) (failure to protect), that the maternal grandmother and the father of J.J. physically struck and abused D.P. as a regular course of discipline and that Mother knew or reasonably should have known of the abuse and failed to protect D.P., and that Mother exposed D.P. to domestic violence. Based on the foregoing findings involving abuse of D.P., the court in October 2002 also sustained a petition finding that N.J. and J.J. were dependents of the court under section 300, subdivisions (a) (serious physical harm) and (b).

Mother was afforded monitored visitation and ordered to attend individual counseling addressing issues of domestic violence, self-esteem, parental responsibilities, and case issues.

In January 2003, another subsequent petition was filed as to all three children after DCFS was informed by the foster mother that in November 2002, D.P. began to reveal to her details of being sexually abused by Mother and J.J.'s father from the time he was two years old until September 2002. D.P. told the foster mother, the social worker, and his therapist that he was forced to perform oral sex on Mother and J.J.'s father, and that J.J.'s

father inserted his penis and a stick into D.P.'s rectum at least two times, and that N.J. and J.J. were present when such abuse occurred.

D.P. expressed anger at Mother, suffered disrupted sleep, and was diagnosed with post-traumatic stress disorder. In March 2003, D.P. no longer wanted to visit with Mother, and the foster mother reported that after such visits D.P. would get nervous and "act out." D.P. told his foster mother that he wanted to forget about his "bad life" with Mother. According to an April 2003 letter by D.P.'s therapist, D.P.'s statements about his history of physical and sexual abuse had been "clear and consistent" since he began therapy in January 2003. D.P.'s therapist recommended that D.P. have no visits with Mother until he was better able to cope with his emotions.

In March 2003, Mother began individual counseling. Mother denied any sexual touching and asserted that almost all of what D.P. said was a lie. Mother admitted that D.P. might have seen Mother and J.J.'s father having sex. On April 15, 2003, the juvenile court suspended Mother's visits with D.P. On May 15, 2003, the court sustained the subsequent petition, finding that the three children were dependent children under section 300, subdivisions (b), (d) (sexual abuse) and (j) (abuse of sibling). Mother was ordered to attend individual counseling and sex abuse counseling for perpetrators. Mother was afforded monitored visits with N.J. and J.J., but no visits with D.P. until his therapist approved of such visits. Mother was also afforded reunification services with respect to N.J. and J.J.

In October 2003, the court identified adoption as the permanent plan for D.P. after the foster mother indicated that she wanted to adopt the three children. In October 2003, Mother only sporadically visited N.J. and J.J. In December 2003, the court ordered that Mother was to have no visits with D.P., terminated her reunification services with respect to N.J. and J.J. and identified adoption as the permanent plan for N.J. and J.J.

From February 2004 to April 2004, Mother regularly visited N.J. and J.J. In January 2004, Mother began the Child Sexual Abuse Treatment Program (CSAP).

When J.W. was born in February 2004, she was detained at the hospital for further medical testing while Mother was discharged. Mother was upset because she wanted to

stay with her baby in the hospital and was “reported as behaving irrationally and uncooperatively with the hospital staff,” and then later she became physically aggressive with a cab driver who refused to take Mother home from the hospital.

On February 19, 2004, DCFS filed a petition seeking to declare J.W. a dependent pursuant to section 300, subdivisions (b), (d), and (j), based on Mother’s sexual abuse of D.P., her failure to comply with court orders and her failure to reunify with J.W.’s siblings. The petition was filed as an IDEA (Identification for Early Adoption) case. On that same date, the juvenile court held a section 366.26 hearing as to D.P. and a detention hearing as to J.W. The juvenile court terminated parental rights to D.P.

The court detained J.W., finding that a prima facie case had been established for juvenile court jurisdiction and that return of J.W. to Mother’s custody would be “contrary to the child’s welfare.” The juvenile court remarked that the case was “not as black and white as this [DCFS] detention report makes it out to look,” that Mother, who was then 22, had herself been a dependent in the system when she was 13, and that the court was aware of Mother’s history. The court stated, “I recognize that your behavior was very young. It was immature, irresponsible, and rebellious, and there were a lot of things going on in your life that you were having difficulty coping with. I recognize all of that. The important thing for me was to try and see all of that in light of what kinds of problems you created for your children. . . . [¶] So besides being young, immature, irresponsible and neglectful, I don’t see that you were ever physically abusive to the children. But I did sustain the petition regarding the sexual abuse and that has certainly hurt D.P. . . . [¶] The question is have you made changes in your life. . . . I think you have made changes based on what you’ve tried to do in the last couple of months. Is that enough at this point? Maybe it is. I’m not sure. I want to believe it is. I’d like to send this child home today. The reason I’m not going to do it is because I need for the worker to go out and check out the situation as it is now. . . . [¶] I don’t know where you are now. I don’t know what you’re doing. [¶] . . . You’re still young at 22. And every person doesn’t grow up immediately at 18 or 21. So you’re slower, and you’ve had a lot of the baggage to bring with you. You [have] got to drop that baggage. It can’t hold you

back any more. Now, that's what you're saying you're on a new path. That's fine. I want the social worker to go out and give me a better report regarding that, to look at this new program that you're trying to do. You're in CSAP. That's a first step. It's taken you a while to get there, but you're there."

The juvenile court further explained its detention ruling, stating that "[b]ut for the reasons that I've stated, there is a prima facie case given the history, given what happened at the hospital, and you did act out and that showed a level of not being in control. Clearly, we expect that everybody would act out if they're trying to do something with their kid. . . . But most people settle down and recognize [that] to act out makes it worse."

Mother was afforded monitored visitation. DCFS was afforded discretion to release J.W. to Mother or a relative.

As she was leaving the courthouse after the February 19, 2004 juvenile court hearing, Mother encountered D.P. and the foster mother in the parking garage. According to D.P.'s therapist, Mother was "highly emotional and said 'upsetting things' to [D.P.] that made him feel uncomfortable." D.P. hid behind his foster mother "because he was very disturbed by the intensity of his mother's behavior and emotional expression." At his next therapy session, D.P. expressed anger at Mother. D.P.'s foster mother also told the therapist that D.P. was more withdrawn after the incident and "exhibited a new behavior of vomiting into his hand and then attempting to eat the vomit."

The DCFS report for the March 17, 2004 jurisdiction and disposition hearing stated that Mother "has now gone services crazy to try and keep [J.W.]," that Mother was going to CSAP and to counseling, and that she was regularly visiting J.W. for two hours every Monday and Wednesday. Mother was "consistent and very appropriate during the visits. She arrives on time. She is affectionate. She interacts with the baby." On March 4, 2004, the social worker visited Mother in her home, a rented room in a house owned by a friend of the maternal grandmother. The social worker reported that Mother's room was orderly, but "[t]he home is not appropriate for a child. There are

many hazards including but not limited to being dirty and cluttered. Furthermore, DCFS does not know who actually resides in the home and their willingness to cooperate with DCFS. The [child's] physical and emotional health would be placed at severe risk of abuse if released to the home of the mother.”

At the March 17, 2004 hearing, Mother waived her rights and the juvenile court found J.W. to be a dependent child under section 300, subdivision (j) (abuse of sibling), and ordered J.W. suitably placed. The matter of reunification services was continued to April 15, 2004. The court explained that “[t]here was an issue [as] to family reunification services. I’m continuing for a 30-day date. I’m removing this child because the mother has demonstrated extremely inappropriate behavior with another child, and the reports for this hearing indicate the mother continues to use very poor judgment placing other children at risk. Whether or not the mother has made substantial growth and efforts to resolve the issue, we’re going to decide when we come back. But the social worker wrote that there was an issue when the mother left the court with another child last time, which indicated, one, that she wasn’t following court orders and, two, she still wasn’t using good judgment. And so I’m not going to return this child to the mother under these circumstances based on the allegations that are sustained and the allegation that the court is aware of because I sustained the petition originally. [¶] . . . Now, we’ll discuss everything else when we come back in 30 days. The mother is in a program right now. Whether she’s making progress, I’ll have to find out.” The juvenile court also directed DCFS to interview Mother regarding her view of the incident with D.P. outside the courthouse in February.

In an addendum report and additional information provided to the juvenile court for the April 15, 2004 hearing, DCFS stated that Mother’s version of the incident with D.P. was that she was not waiting for D.P. but did happen to see him leave; Mother thought that was the last time she might see D.P., so she said goodbye to him. Mother denied that she was screaming, but she was talking loud enough for D.P. to hear her. Attached to the DCFS addendum report was an April 6, 2004 letter from Mother’s CSAP counselor, who evaluated Mother’s progress in the program. The letter stated that

normally the program does not provide a progress report until the client has attended the program for a minimum of six months, and Mother had begun the program only in January 2004. The letter indicated that Mother had attended regularly 8 of 12 sessions, participated actively in the group, was respectful of others, was willing to self-disclose, and was able to recognize poor family communication patterns. With respect to Mother's understanding of the dynamics of sexual abuse, the counselor indicated that Mother recognized the seriousness of the problem, how harmful the molestation was to the victim, and admitted the betrayal of trust, but that Mother had not yet accepted full responsibility for the molestation. Mother's strengths were that she had the willingness to acknowledge her errors, to change, and to learn new ways to parent; she showed a sense of shame and seemed distressed by the loss of parental status and frustrated by her current situation. Mother also was committed to improving her family situation, was able to comply with acceptable social norms, had the insight and intelligence to grasp the material presented in group therapy, and was developing problem-solving skills. The letter concluded that "[Mother] has been active in the group and seems willing to address her levels of responsibility in the molestation. [Mother] denies direct molestation but seems to understand that she has in some way been responsible for the child's allegations and feeling of having been a victim. It is hoped that [Mother] will be willing to delve even deeper into what transpired with the child."

DCFS recommended that Mother not receive reunification services. DCFS's report characterized the letter from CSAP as showing that Mother's "understanding of the dynamics of sexual abuse appears to be minimal as she continues to be in denial," and that Mother was "not able to safely care for [the] children[,] as the underlying issue that [led] her to abuse [D.P.] has not been addressed let alone resolved." At the hearing, DCFS argued that it "does not believe that it's in this new baby's best interest to try reunification services based on the track record. The case law instructs us that the parent's past behavior is the best indicator. . . . That intellectual honesty is a good predictor of what progress is being made. [¶] So when the court looks at progress, Mother's continual denials [militate] against true progresses being made." DCFS argued

that reunification services should be denied based on section 361.5, subdivisions (b)(6), (b)(10), and (b)(11). (See fn. 2, *ante.*)

Mother's counsel argued that Mother should be given a chance to reunite with J.W. because Mother was, beginning in January 2004, motivated and willing to complete the programs to turn her situation around; she missed some programs in February during the time J.W. was born but had been attending CSAP and counseling regularly. Mother was also working part time and had her own apartment.

J.W.'s counsel argued that reunification services would not be of benefit to J.W., who was then placed with her siblings and doing very well. "There's no reason to put [J.W.] through the pain of family reunification when the mother has not begun to admit the sex abuse."

The juvenile court granted Mother reunification services. The court found that with respect to the CSAP evaluation, "Most of the boxes that are positive are checked in this case." The court acknowledged that the CSAP evaluator believed that Mother had not yet accepted full responsibility for the molestation, and that this was a very important consideration. But the court concluded that "[i]t looks like the client is on the way to that," and "on the whole in the few months that [Mother] has been in this program . . . [it] appears that she's making great progress toward having all the [positive] boxes checked. She's making this effort. [¶] I agree that one of the problems has been that her background, her situation, her ability to mature and have support and have appropriate parenting models has been missing. So it will be harder for her. She has made very inappropriate choices regarding the men in her [life]. [¶] . . . And she's going to need to find some coping skills and some support mechanisms. The court views her as making efforts toward change, great efforts toward change. Staying on course. And under these circumstances, I think it's in this baby's best interest to have reunification services. [¶] I make this finding by clear and convincing evidence And I don't think it would be in her best interest not to have reunification. [¶] . . . Notwithstanding that [Mother] was young, immature, in denial, and missed [the] opportunity regarding her [other] children,

her recent efforts are strong enough and she's committed enough, so there's a . . . substantial probability that she could reunify with this child."

Through her counsel, J.W. appealed from the order granting Mother reunification services.³ She contends that substantial evidence does not support the order granting reunification services and that the juvenile court erred in failing to deny reunification services under section 361.5, subdivisions (b)(6), (b)(10) and (b)(11). (See fn. 2, *ante*.)

DISCUSSION

"Section 361.5 authorizes, but *does not require*, the court to deny services in the specified circumstances." (*Renee J. v. Superior Court* (2002) 96 Cal.App.4th 1450, 1464.) "[E]ven in the face of a finding under section 361.5, subdivision (b)(10), the juvenile court may still order reunification services if it finds, by clear and convincing evidence, that reunification is in the best interest of the child. (§ 361.5, subd. (c).)" (*Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 750; *Pablo S. v. Superior Court* (2002) 98 Cal.App.4th 292, 301 [same rule with respect to section 361.5, subdivision (b)(6)].) Thus, "evidence of a parent's current fitness may, in appropriate circumstances, persuade the juvenile court to order reunification services despite his or her problematic history." (26 Cal.4th at p. 750.) This statutory scheme "affords the juvenile court considerable discretion to evaluate the circumstances of a particular case and reach an appropriate disposition." (*Marshall M. v. Superior Court* (1999) 75 Cal.App.4th 48, 59.)

"Courts must keep in mind that '[f]amily preservation, with the attendant reunification plan and reunification services, is the first priority when child dependency proceedings are commenced.' [Citation.] The failure of a parent to reunify with a prior child should never cause the court to reflexively deny that parent a meaningful chance to do so in a later case. To the contrary, the primary focus of the trial court must be to *save* troubled families, not merely to expedite the creation of what it might view as better

³ Mother filed a respondent's brief. DCFS did not file an appellate brief, but filed a letter stating that it is aligned with the position taken by J.W.

ones.” (*Renee J. v. Superior Court, supra*, 96 Cal.App.4th at p. 1464.) “If the evidence suggests that despite a parent’s substantial history of misconduct with prior children, there is a reasonable basis to conclude that the relationship with the current child could be saved, the courts should always attempt to do so.” (*Ibid.*)

In addition, the “reasonable effort to treat” standard in section 361.5, subdivisions (b)(10) and (b)(11) “is not synonymous with ‘cure.’ The mere fact that [the mother] had not entirely abolished her drug problem would not preclude the court from determining that she had made reasonable efforts to treat it.” (*Renee J. v. Superior Court, supra*, 96 Cal.App.4th at p. 1464.)

Both J.W. and Mother agree that we review the order of the juvenile court under the substantial evidence test. (See *In re Brian M.* (2000) 82 Cal.App.4th 1398, 1401.)

We conclude that substantial evidence supports the juvenile court’s findings that Mother’s relationship with J.W. reasonably could be saved and that reunification was in J.W.’s best interest. Substantial evidence supports the juvenile court’s findings that Mother recently made great efforts to change her life, that she was making great progress in the CSAP program, and that she was “on the way” to accepting full responsibility for the molestation of D.P.

The court also noted that Mother had made inappropriate choices regarding the men in her life, referring to the father of J.J., who had molested D.P. The juvenile court impliedly found that Mother, who was no longer involved with the father of J.J., was making reasonable efforts and progress in addressing the sexual abuse issue and that it was likely that reunification with J.W. would be successful. “The fact that a parent or guardian is no longer living with an individual who severely abused the child may be considered in deciding that reunification services are likely to be successful, provided that the court shall consider any pattern of behavior on the part of the parent that has exposed the child to repeated abuse.” (§ 361.5, subd. (c), 4th par.)

The record shows that Mother was making substantial progress in her programs, she was committed to reunify with J.W., her visits with J.W. were consistent, and she acted affectionately and appropriately with J.W., who was only about two months old at

the time of the April 15, 2004 hearing. The foregoing constitutes substantial evidence that reunification would be in J.W.'s best interest.

Without citation of any authority, J.W. argues that because the juvenile court had found on March 17, 2004, by clear and convincing evidence, that removal of J.W. from Mother's custody was required, "the court had no substantial evidence on which to base a finding that it would be in [J.W.'s] best interest to be reunited with her." J.W. fails to establish that the two orders are necessarily inconsistent, or that the issue of the removal of the child from parental custody is governed by the same considerations as the issue of the granting of reunification services to a parent under section 361.5, subdivision (c). We conclude that substantial evidence supports the juvenile court's order granting reunification services to Mother pursuant to section 361.5, subdivision (c).

DISPOSITION

The April 15, 2004 order is affirmed.

NOT TO BE PUBLISHED.

MALLANO, J.

We concur:

SPENCER, P. J.

VOGEL, J.